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HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1955.

No. [redacted] 154

EDWARD M. KEATING and MERCANTILE NATIONAL BANK OF HAMMOND, as Trustee,

Petitioners,
(Defendant-Appellants),

vs.

THE BUCKEYE PIPE LINE COMPANY,

Respondent,
(Plaintiff-Appellee),

and

THE TOWN OF HIGHLAND, LAKE COUNTY, INDIANA, and TRAVIS H. CRAMB, JAMES R. BATEMEN, JOHN W. FARMER, ROBERT L. ROSS, BENJAMIN GEARHART, as Members of the Board of Town Trustees of the Town of Highland, Lake County, Indiana, and CYREL W. MELTON, HERBERT E. STUART, HAROLD VOREIS, GEORGE W. BRANT, KENNETH L. DICKINSON, BENJAMIN GEARHART, LARRY N. ASHTON, JOHN W. FARMER, ROBERT L. ROSS, RAYMOND B. YOUNG, MERLE W. NICEWANDER, as Members of the Plan Commission of the Town of Highland, Lake County, Indiana,

Respondents,
(Defendant-Appellees).

PETITION FOR WRIT OF CERTIORARI
to the United States Court of Appeals
for the Seventh Circuit

OWEN W. CRUMPACKER,
314 Hammond Building,
Hammond, Indiana,
Attorney for Petitioners.

Midwest Law Printing Co., - 326 N. Michigan Ave., Chicago.
Telephone: Financial 6-3988

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Respondents,
(Defendant-Appellees).

PETITION FOR WRIT OF CERTIORARI
to the United States Court of Appeals for the Seventh Circuit

May it Please the Court:

Edward M. Keating, of Lake Forest, Illinois, and Mercantile National Bank of Hammond, as Trustee, a national banking association, actively engaged in the banking business under the national banking laws in Hammond,

Lake County, Indiana, by their counsel, respectfully represent to this Honorable Court as follows:

(a) The Court of Appeals' opinion is officially reported in:

Buckeye Pipe Line Company v. *Edward M. Keating and Mercantile National Bank, as Trustee, et al.*, (1956) 229 F. 2d 795,

and is appended at page 21 hereof. The District Court (Northern District of Indiana) did not render an opinion. The findings of fact, conclusions of law and decree entered in lieu of an opinion appear at pages 24 through 33 of the transcript filed in accordance with Rule 21 (1), and are appended hereto at page 30.

(b) The grounds on which jurisdiction of this court is invoked are concisely stated as follows:

(i) The Court of Appeals' opinion was entered on February 14, 1956.

(ii) Your petitioners' rehearing petition (filed within the time authorized) was denied by the Court of Appeals on March 13, 1956, Chief Judge F. Ryan Duffy voting to grant rehearing. The order is appended at page 43 hereof.

(iii) Jurisdiction to review the judgment of the Court of Appeals is believed to be conferred on this court by **28 U.S.C. 1254 (1)** and **28 U.S.C. 2101 (c)**.

(c) Petitioners present the following questions for review:

(i) The Court of Appeals for the Seventh Circuit has decided an important state question in conflict with the real estate law of Indiana (and all common law states).

That the Court of Appeals has sought to establish an important precedent extremely beneficial to transcontinental pipe line companies (Respondent Buckeye Pipe Line Company was a former member of the Standard Oil Company trust) appears from the opening sentence of the Court of Appeals' opinion, which we quote as follows: "This case involves a type of conflict that is often occurring throughout the United States."

The opinion decides, as a novel precedent, that a pipe line company, which has obtained, for one dollar, an ancient (1888) easement to lay a subsurface pipe at an undefined place across farmland may convert the same, through a combination injunction-quiet title suit in a federal court into fee ownership of a valuable twenty foot strip of urban right-of-way. The opinion describes the easement procured (appendix, page 22), admits that the pipe line company "prayed that its title in the easement be quieted against all defendants, etc.," but omits reference to the following important aspects of the District Court's conclusions of law and decree in which the District Court creates and quiets the title in the Buckeye Pipe Line Company:

> "2. The plaintiff has an easement for its pipe line with the right to operate, maintain, repair and remove the same at any time. **The rights are incident to a twenty foot strip parallel to a street, etc * * *.**
>
> 3. Plaintiff's title to and rights in said easement are superior to all the defendants herein.

4. Plaintiff is entitled to an injunction restraining each and all the defendants herein from directly or indirectly paving over the east and west cross streets over **plaintiff's twenty foot strip on Fourth Street** and from indirectly or directly constructing any other permanent structure over such twenty foot strip or causing or permitting any vehicular traffic to pass over such twenty foot strip."

(District Court's conclusions of law, transcript page 31, appendix page 40.)

"1. Defendants Edward M. Keating, Mercantile National Bank of Hammond, Indiana, as Trustee * * * (herein are named all defendants) * * * are permanently enjoined and restrained from directly or indirectly paving over the east and west cross streets over **plaintiff's twenty foot strip etc.** * * * and from directly or indirectly constructing any other permanent structures over such twenty foot strip or causing or permitting any vehicular traffic to pass over such twenty foot strips at intersections."

* * * * *

"3. It is further ordered, adjudged and decreed that the plaintiff's title to and rights under the aforesaid easement be quieted against all defendants herein."

(District Court's decree, transcript page 32, appendix, page 42.)

The manner in which the Court of Appeals' opinion conflicts with the state law pertaining to real estate titles is best expressed by the Court of Appeals of Ohio (Buckeye is a citizen of Ohio) in an opinion reversing a decree in which Respondent Buckeye Pipe Line Company had obtained in the nisi prius court in *Besser* v. *Buckeye Pipe Line Co.*, (1937) 57 Ohio App. 341; 13 N. E. 2d 927 at page 928:

"[1] The appellee boldly asserts that, because of the descriptive words 'over and through' appearing in the easement, it had acquired a right to lay its pipes *on the surface of the plaintiff's tillable lands if it chose to do so*, or it might bury them just beneath the surface if it so elected, and that it was not encumbent upon it to place its pipes below plow depth. It is our judgment that this position is not sustainable. The phrase 'over and through' tillable lands as employed in pipe line easements in this part of the country are not conclusively descriptive of the manner of their crossing, construction, or maintenance, but are rather creative of the right of entry and uses of that portion of the subsurface lands necessary for construction and maintenance of the pipe line. This was what the appellee secured by the grant and no more. The other quoted provision plainly indicates that the grantors, the plaintiff and his wife, reserved 'the right to fully use and enjoy said premises except for the purposes hereinbefore granted.' The right to construct and maintain the pipes in the ground was the only easement conveyed. **It did not include a perpetual occupancy of the surface.**"

[**"2, 3] To hold otherwise would work a manifest injustice. It would be to hold contrary to the rule that contracts are to be more liberally construed in favor of him who is not the author of the agreement and with strictness against him who drew it. **It is rather shocking to the members of this court that for a mere pittance the parties intended to convey and acquire a perpetual leasehold easement to the surface of valuable agricultural lands.** We have positive views to the contrary, fortified in part by the generally accepted practice in this state, that when the parties contracted it was covenanted by implication, if not by express provision, that the grantors reserved this strip of land for farming purposes. In fact, he never parted with his right to so enjoy his property."**

Indiana, like Ohio, is a common law state. Rights in real estate, whether fee simple or easement, are determined by state law. Under Indiana law, the contract purchaser of a right to lay a subsurface pipe does not obtain exclusive occupancy of the surface of the land as decided by the Court of Appeals in the decision sought to be reviewed.

(ii) The Court of Appeals has decided a federal question in conflict with decisions of this court. In *Whitehead* v. *Shattuck, et al.* (1891), 138 U. S. 146, 11 S. Ct. 276, 34 L. Ed. 873 this court held that courts of the United States were without jurisdiction to entertain a quiet title suit by one out of possession against one in possession. This principle has been recognized and followed in *United States* v. *Bitter Root Dev. Co.*, (1906) 200 U. S. 451, 472, 26 S. Ct. 318, 50 L. Ed. 550; *Schoenthal* v. *Irving Trust Co.*, (1932) 287 U S. 92; 53 S. Ct. 50, 77 L. Ed. 188; and *Guaranty Trust Co. of New York* v. *York* (1945), 326 U. S. 99, 65 S. Ct. 1464, 89 L. Ed. 2084. In Indiana, quiet title is a statutory remedy in which the parties are entitled to a jury trial. Petitioners' timely demand for a jury trial on the quiet title issue in the instant case was denied and the District Court proceeded to try the case and quiet Buckeye's title to a twenty foot strip of land which it never possessed and had no claim to.

(iii)) The Court of Appeals has sanctioned a departure by the District Court for the Northern District of Indiana so far from the accepted and usual course of judicial proceedings as to call for this court's power of supervision. The petitioner Mercantile National Bank of Hammond, as Trustee, was exercising trust powers under written agreements with petitioner Keating. These trust powers are authorized by the national banking laws. Although it was named as a defendant in the suit, it was

not alleged that it had committed any acts of trespass. No injunctive relief was sought against it. (Transcript of record, pages 5-8). After a motion to dismiss had been granted (Transcript, page 19) Buckeye filed an amendment asserting that petitioner Mercantile National Bank of Hammond was claiming an interest adverse to the Buckeye. (Transcript of record, pages 21-22). The allegations in the amendment were denied. (Transcript of record, page 23) No proof of any unlawful acts was offered. In spite of the lack of allegations or proof, a permanent mandatory injunction was entered against petitioner enjoining it from paving over "plaintiffs' 20 foot strip", "directly or indirectly constructing any other permanent structures over such 20 foot strip," or "causing or permitting any vehicular traffic to pass over such 20 foot strips at said intersections". How petitioner Mercantile National Bank was to prevent traffic on the public streets in Highland, Indiana, is not spelled out in the decree. (Upon the rendition of the decree, the Town of Highland blocked the public streets with horizontal telephone poles. They remain blocked in this manner at the present.)

The Court of Appeals for the Seventh Circuit affirmed the decree.

The rendition of a permanent mandatory injunction against a national bank ordering it to perform functions in the nature of police functions on public streets, all without pleadings or proof of a legal duty, or unlawful acts is wholly without legal precedent and is such an extreme departure from the usual course of judicial proceedings as to require supervisory intervention by this Court.

(iv) The petitioners represent the following statutes are involved in the present case:

"State laws as rules of decision:

"The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply. June 25, 1948, c. 646, 62 Stat. 944." 28 U.SC.A. 1652.

"Rules of Civil Procedure for district courts.

The Supreme Court shall have the power to prescribe, by general rules, the forms of process, writs, pleadings, and motions, and the practice and procedure of the district courts of the United States and of the District Court for the Territory of Alaska in civil actions.

Such rules shall not abridge, enlarge or modify any substantive right and shall preserve the right of trial by jury as at common law and as declared by the Seventh Amendment to the Constitution.

Such rules shall not take effect until they have been reported to Congress by the Chief Justice at the beginning of a regular session and until after the close of such session.

All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect. Nothing in this title, anything therein to the contrary notwithstanding, shall in any way limit, supersede, or repeal any such rules heretofore prescribed by the Supreme Court. June 25, 1948, c. 646, 62 Stat. 961, amended May 24, 1949, c. 139, § 103, 63 Stat. 104; July 18, 1949, c. 343, § 2, 63 Stat. 446." 28 U.S.C.A. 2072.

A Concise Statement of the Case.

Petitioner, Edward M. Keating, defendant in the District Court and one of the two appellants in the Court of Appeals, purchased the fee title to land in the Town of Highland, Lake County, Indiana, for the purpose of subdividing it, and, after installation of improvements, selling the individual parcels for residence purposes. Four subdivision plats, including street layouts and specifications, were submitted to the respondent members of the Plan Commission and Town Board of the Town of Highland. The plats were accepted and approved by the Town of Highland. The individual lots were then conveyed to petitioner Mercantile National Bank of Hammond, as Trustee, under written trust agreements with Keating and contractors who were to install streets, sewers, water mains, sidewalks, etc.. The land was purchased by Keating subject to an easement issued in 1888 by two farmers, Wicker and Clough, to respondent Buckeye Pipe Line Company's predecessor in interest. The material portions of the easement are quoted in the opinion of the Court of Appeals appended at page 22. A cast iron pipe was installed across the farmland a foot below the surface in 1888 and remained in its original position until 1923 when it was replaced by another steel pipe buried to the same approximate depth. In platting the four subdivisions, petitioner Keating left a 20 foot strip centered by the pipe unplatted. This strip, occupied by the pipe, was crossed by four proposed streets on the plat. When the contractors were in the process of constructing the four streets across the pipe, the Buckeye Pipe Line Company, after serving damage notices on the bank, title company, residents, and Town Board Members, filed an injunction

suit in the United States District Court for the Northern District of Indiana naming petitioners, and respondent Town of Highland and its officials as parties defendant. Jurisdiction was based on diversity of citizenship. After a motion to dismiss (filed by petitioner Mercantile National Bank of Hammond, as Trustee) was sustained, an amendment seeking a quiet title decree was filed. Petitioners then demanded a jury trial on the quiet title issue but the request was denied. The District Court entered a permanent injunction against all defendants enjoining them from paving over the 20 foot strip occupied by the pipe at street intersections, building any structures on the 20 foot strip, and requiring the defendants to stop vehicular traffic over the cross streets. Title to the 20 foot strip was quieted in Buckeye. From this decree, petitioners appealed to the Court of Appeals for the Seventh Circuit. The decision of the District was affirmed. Rehearing was denied, Chief Judge F. Ryan Duffy voting in favor of rehearing. Appendix, page 43.

The Town of Highland was incorporated in 1910. The population grew from 2,000 to approximately 9,100 from 1940 to 1953. After the plats were recorded, and the property was improved up to the intersection of the four cross streets with the pipe, approximately 165 homes were built on the lots conveyed by petitioner Mercantile National Bank of Hammond, as Trustee, pursuant to the terms of the trust agreement. The homes are located within approximately ¼ to ½ mile from the main business district of the Town of Highland. The four public streets have remained barricaded since the rendition of the decree by the District Court to the great inconvenience of the public.

The basis for federal jurisdiction in the District Court was diversity of citizenship, 28 U.S.C. 1332.

ARGUMENT.

i.

The Court of Appeals has decided an important state question in conflict with the real estate law of Indiana.

Respondent Buckeye Pipe Line Company owns subsurface pipes throughout the Middle West through which it pumps crude petroleum from the oil fields to refineries in Northern Indiana. Most of the rights to lay and maintain the pipes were acquired in the form of easements similar to the one involved in the case at bar. They were procured from farmers toward the close of the last century for nominal considerations. Due to industrial development in the Middle West and resulting population increases, new and different uses for the land occupied by the pipes have become important. To buy or condemn rights consistent with the present land values would require considerable expenditures of money by pipe line companies, including the Buckeye. A policy of obstructing developments (with court proceedings, if necessary), has been determined to be more practical.

That the 1888 easements did not give the pipe line companies **surface rights** was determined in an Ohio case in which the Buckeye Pipe Line Company was an appellee. *Besser* v. *Buckeye Pipe Line Company*, (1937) 57 Ohio App. 341, 13 N. E. 2d 927.

The Shell Pipe Line Corporation unsuccessfully sought to obstruct the subdivision and sale of farmland under similar circumstances, in St. Louis County, Missouri. The land owner, in a proceedings in the District Court for the Eastern District of Missouri, successfully obtained a construction of the easement authorizing him to improve the property despite a pipe easement. *Babler* v. *Shell Pipe*

Line Corp., (1940) 34 Fed. Supp. 10. The District Court, in its opinion, made the following pertinent comment at page 14:

> "It may appear illogical that the contract should be construed as intended to confer a right which is the counterpart of the right of eminent domain when the latter may be possessed by defendant as a result of legislative enactment. The answer is that the reason or purpose for the agreement is now of importance only to the extent that such considerations may be valuable in determining the meaning of the instrument. After the meaning of the instrument has been determined it is unimportant that parties may have or may be able to secure the same rights in a different manner. Defendant or its predecessors in title may, although possessing the power of eminent domain, for good reason not have desired to exercise that right. The curious may find a reason for such an attitude in *Ozark Pipe Line Corp.* v. *Monier et al.*, 266 U.S. 555, loc. cit. 566, 45 S. Ct. 184, 69 L. Ed. 439"

Under the Indiana law, an easement in the lands of another is construed according to the terms of the contract, it is strictly construed with reference to the grant. 17 Am. Jur. Easements, Par. 97, page 995; 17 Am. Jur. Easements, Par. 107, page 1002. *Cleveland C. C. & St. L. R. Co.* v. *Griswold*, (1912) 51 Ind. App. 497, 97 N.E. 103, *Forsythe* v. *American Maize Product Co.*, (1915) 59 Ind. App. 634, 97 N.E. 1030.

In discussing the legal effect of the appellee's easement for a sub-surface pipe in the *Forsythe* case, *supra*, the Indiana Appellate Court stated at page 638:

> "These instruments must all be considered in determining the rights of the parties and in ascertaining whether they convey inconsistent privileges or whether the several rights granted may coexist without any necessary conflict. *Roush* v. *Roush* (1900), 154

> Ind. 562, 570, 55 N.E. 1017; *Law* v. *Streeter* (1889), 66 N. H. 36, 20 Atl. 247, 9 L. R. A. 271."

The Court concluded that the right to maintain a sub surface pipe could coexist with the right to maintain a harbor without necessary conflict.

By virtue of 28 U.S.C.A. 1652 quoted above, the District Court and the Court of Appeals were required to recognize the rules of decision in Indiana. As stated in *Guaranty Trust Co. of New York* v. *York*, (1945) 326 U.S. 109, 65 S. Ct. 1464, at page 1468:

> "In giving federal courts 'cognizance' of equity suits in cases of diversity jurisdiction, Congress never gave, nor did the federal courts ever claim, the power to deny substantive rights created by State law or to create substantive rights denied by State law."

Petitioner Edward M. Keating was denied his substantive rights, as a fee owner, to use the surface of the land which he purchased. He was denied the right to have the easement construed in accordance with Indiana law.

The importance of the opinion and decision of the Court of Appeals to the public interest cannot be overlooked. It selects two authorities for holding that Buckeye's rights are superior to those of petitioners and the defendant town officials, *Panhandle Eastern Pipe Line Co.* v. *State Highway Commission*, (1935) 294 U. S. 613, 55 S. Ct. 563, 79 L. Ed. 1090 and *Thomas* v. *Lauer* (1949) 227 Ind. 432, 86 N.E. 2d 71. A comparison between the District Court's findings and the opinion of the Court of Appeals decision make it apparent that the real issues on appeal were obscured in the interests of creating a precedent for the benefit of pipeline companies.

In the *Panhandle* case, this Court held a Kansas Statute unconstitutional which authorized the highway commission to *order removal* of installations, both surface and subsurface, from a right-of-way acquired by the pipeline company from fee owners without compensation. *Thomas* v. *Lauer* holds that the lessee of *buildings* under a 10 year lease has a recognizable interest in condemnation proceedings. The soundness of these decisions *is* not questioned. They simply have no application to the case at bar.

The real question, which the Court of Appeals has attempted to obscure by a misapplication of the precedents, is not whether the landowner or the public *has* the right *to* order removal of the pipes without compensation, *but whether the pipeline company may prevent the land owners and the public from adapting the land to a different and more suitable use than farming* without paying a premium to the pipeline company. Both the District Court and the Court of Appeals have held that "the pipeline company's rights are "superior" to those of either the landowner or the public. The language in the opinion about *drainage etc.* is merely window dressing designed to obscure the misuse of the Federal Court's injunctive powers.

The decision is without precedent. All of the pipeline companies are interstate in operations; diversity is easily established armed with a certified copy of the District Court's findings and the present opinion of the Court of Appeals, they are in a position to oppress landowners or municipality that seeks to open a street over a buried pipe.

The landowners, who seeks to improve his land, is without authority to condemn. Furthermore, there is nothing to condemn because he has the fee ownership of the land with full surface rights under State law. After accepting a street, dedicated by plat, there is nothing for the municipality to condemn because it has the right to construct pavement on the surface over a buried pipe. It is admitted that neither the landowner nor the public may damage the pipe. *But no damage,* in fact, results from the construction of a street as is shown by the District Court's failure to find any prospective damage other than the ephemeral "probability" that the corrosion rate of pipe will be increased because of the proximity of steel mill slag. (See District Court's finding 25, appendix, page 38.) The witness, upon whose testimony this finding was made, admitted that he had never heard or read of a single instance where increased corrosion resulted from the proximity of slag. Transcript, page 108.

ii

The Court of Appeals has decided a federal question in conflict with decisions of this Court.

In *Whitehead* v. *Shattuck, et al.* (1891) 138 U. S. 146, 11 S. Ct. 276, 34 L. Ed. 873, it was determined that courts of the United States were without jurisdiction to entertain a quiet title suit, in equity, by one out of possession against one in possession. See also decisions under "questions presented", supra. The basis of the decision was that the State of Iowa afforded a plain adequate and complete remedy at law in which the parties had a constitutional right to a trial by jury in a quiet title case. In quiet title, the defendant in possession is being deprived of his property, to-wit: real estate. The effect of this decision upon

the jurisdiction of federal courts in quiet title cases is ably discussed in the case of *Johnston* v. *Corson Gold Mining Co.* (1907) 157 Fed. 145. The *Whitehead* decision, supra, has been followed, with approval, by this Court down to and including the decision in *Guaranty Trust Co. of New York* v. *York*, previously cited, quoted above. The statute authorizing this court to make rules of civil procedure for District Courts preserves the rule of law referred to, 28 U.S.C.A. 2072.

When the Buckeye Pipe Line Company filed the amendment to its complaint creating a new issue in quiet title the defendants demanded a trial by jury. This request was denied by the District Court. In Indiana, as in Iowa, quiet title is a statutory remedy. *Burns Indiana Statutes* Annotated, 1946 Replacement, Volume II, Part 2, Sections 3-1302, 3-1303, 3-1401, and 3-1403. It is triable by jury. *Macy* v. *Wood*, (1912) 49 Ind. App. 469, 97 N.E. 553; *Folson* v. *Buttolph*, (1924) 82 Ind. App. 283, 143 N.E. 258.

The denial of the right of a jury trial under similar circumstances, was held to require the granting of certiorari and reversal in *Schoenthal, et al.* v. *Irving Trust Co.* (1932) 287 U. S. 92, 53 S. Ct. 50.

iii

The Court of Appeals has sanctioned a departure by the District Court for the Northern District of Indiana so far from the accepted and usual course of judicial proceedings as to call for this court's power of supervision.

Following the trial, the District Court failed to find any facts showing interference, actual or threatened, with respondent Buckeye's buried pipe. The only suggestion in the District Court's findings of any damage to the pipe, either actual or potential, by virtue of the street crossing, is as follows:

> "A six or seven inch base of mostly slag and some stone would be necessary, with a pavement one or two inches thick on top of this. The slag when placed at such close proximity to the pipe line *probably would increase the corrosion rate of the line.*" (District Court's findings, appendix, page 39.)

The speculative probability of an increase in corrosion rate of a pipe that has been out in a plowed field for 33 years will not support an injunction.

Under prior decision of the Court of Appeals for the Seventh Circuit in cases arising in Indiana, the Indiana rule that failure to find material facts in support of the complaint is equivalent to a finding for the defendant on these allegations was followed. *Walling* v. *Plymouth Manufacturing Corp.* (1943) 139 Fed. 2d 178, at pages 179 and 180; *Container Patents Corp.* v. *Stant* (1944) 143 F. 2d 170 at page 172; *Shapiro* v. *Rubens* (1948) 166 F. 2d 659 at page 667. In applying the same rule to an affirmative defense in *Container Patents Corp.*, supra, Justice Sher-

man Minton, speaking for the Court of Appeals, stated at page 172:

> "But even assuming that this question had been presented to the trial court, the absence of any findings by the Court thereon is equivalent to a finding against the defendants, whose burden it was to sustain this proposition."

Ignoring this important rule of appellate procedure, the Court of Appeals, in the instant case, proceeded to weigh the evidence and sustain the decree on a new and erroneous factual theory:

> "The most important element in this method of protecting the pipe is, of course, drainage, and it has not been shown that the appellants plan to put drains of any kind around this pipe."

Opinion, Appendix, page 27.

Even admitting that the Court of Appeals had the right to ignore the above mentioned decisions, weigh the evidence, and make new findings, it still had no right to enter an injunction against petitioner Mercantile National Bank of Hammond, as Trustee. The Mercantile National Bank was merely performing office functions as a trustee. The contractors were neither its agents nor its employees. It was not alleged that it committed any acts of trespass or threatened to commit any such acts. Injunctive relief was not sought against it. Nevertheless, a full and final injunctive decree was rendered against it.

It was not required to suffer the stigma of a mandatory injunction. *Fidler, et al.* v. *Roberts*, C.C.A. 7 (1930) 41 F. 2d 305, 308; *International Register Co.* v. *Recording Fare Register Co., C.C.A.* 2, (1907) 151 F. 199, 202; *Western Fruit Growers* v. *United States*, C.C.A. 9 (1941) 124 F. 2d 381, 386; *Behre* v. *Anchor Insurance Co.*, C.C.A. 2 (1924) 297 F. 986.

It is self-evident that a complaint and evidence in support of the complaint are fundamental requisites of judicial process in federal courts. The Court of Appeals has sanctioned a judicial departure by the District Court from these vital processes in entering a decree impossible of performance against a national bank. A stronger reason for invoking the supervisory powers of this Court cannot be shown.

Therefore, it is respectfully urged that a writ of certiorari issue to the Court of Appeals for the Seventh Circuit and that, upon review, the decision of the Court of Appeals be reversed.

Respectfully submitted,

Owen W. Crumpacker,
Attorney for Petitioners,
Edward M. Keating and
Mercantile National Bank
of Hammond, as Trustee.

APPENDIX.

IN THE

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

October Term, 1955 January Session, 1956.

Buckeye Pipe Line Company,
Plaintiff-Appellee,

vs.

Edward M. Keating and
Mercantile National Bank of Hammond, as Trustee,
Defendants-Appellants,

and

The Town of Highland,
Lake County, Indiana, et al.,
Defendants-Appellees.

Appeal from the United States District Court
For the Northern District of Indiana, Hammond Division.

No. 11565.

February 14, 1956.

Before DUFFY, *Chief Judge*, FINNEGAN and SWAIM, *Circuit Judges.*

SWAIM, *Circuit Judge.* This case involves a type of conflict that is often occurring throughout the United

States. A pipe line, used for transporting crude oil, has been located and operated pursuant to an easement since 1888. In 1952 urban growth led to the subdivision of the land through which the pipe ran and the construction of houses, street and all the requirements of a city residential area. Four of the streets of the subdivision cross the pipe line, and the foundation of the pavement of at least one of these would extend about two inches below the top of the pipe. The plaintiff claims that unless the pipe is lowered and incased it will be damaged by the impact of traffic over these streets and by increased corrosion caused by the paving materials. Each party wants the other to pay for lowering and incasing the pipe which the trial court found would cost $2,900.00.

In communities such as the one here involved conflicts due to changing land use often occur, and ordinarily the parties recognize the rights of all concerned and an agreement is reached. But in this case the owner of the pipe line, on the one hand, and the owners of the land and the city and its officials, on the other, refuse to make any concessions or come to any agreement. In the meantime, the pipe line is in danger of being damaged and the residents of the subdivision and others are forced to walk and drive through the mud because the streets have not been paved for twenty feet on each side of the pipe.

The easement, which the plaintiff claims is being interfered with, was granted in 1888:

> "In Consideration of One Dollar, the receipt of which is hereby acknowledged, We J. H. Clough and C. G. Wicker of Chicago, Ill., individually and jointly have granted to The National Transit Company, its successors and assigns, the right to lay a pipe line

across the following described land situated in Lake County, State of Indiana, viz:

"• • • It is understood and agreed that this right of way does not convey any fee interest in the land above described, together with the right to operate, maintain, repair and remove the same at any time. The pipe shall be laid along the route as indicated by the present survey, and be buried to such a depth as not to interfere with the cultivation of the land, or the existing tile drainage. The National Transit Company, its successors and assigns, agree to pay all damage to growing crops occasioned by laying, operating and removing said pipe line • • •."

In the same year an oil pipe line was constructed about one foot below the surface of the land described in the above grant. The present owners of the land and of the pipe line, who are parties in this litigation, are the successors to the parties of the original grant of the easement.

In 1910 the Town of Highland, Indiana, was incorporated south of the land through which the above easement was granted, and in 1952 that land was purchased by defendant Keating and subdivided to provide a residential area for Highland. This litigation arises because Buckeye Pipe Line Company claims that the construction and use of streets over its pipe line will result in damage unless the pipe line is lowered and incased. Both parties claim that their interest in the land is superior and that the other party must pay for lowering and incasing the pipe line. The appellants also argue that the streets in question will not injure the pipe.

The plaintiff's pipe line runs north and south through the subdivision, Highland Terrace, and four of the new

east-west streets in the subdivision cross the pipe. Each of these four streets has been graded and paved to within ten feet of each side of the pipe. The parties apparently are determined to leave the subdivision in this condition until the courts have settled their dispute.

Buckeye Pipe Line Company brought this suit against Edward M. Keating, who subdivided the land, Mercantile National Bank of Hammond, Indiana, the trustee of the subdivision, and the town of Highland and its officials. Plaintiff prayed that its title in the easement be quieted against all the defendants, that the defendants be permanently enjoined from building any structure that would interfere with the pipe or its accessibility for maintenance purposes, and that $15,000.00 damages be awarded. The trial court found no evidence of actual damage to the pipe line, but did find that the four streets, if completed as planned, and the traffic thereon would be likely to injure the pipe at its present depth. The court held that Buckeye's easement was superior to any later acquired interest, and that the defendants would have to adapt their use of the land to the rights of the Pipe Line Company. The court's decree awarded no monetary damages but enjoined the defendants from paving the streets over the pipe line and required them to take what ever steps were necessary to prevent traffic from crossing over the pipe. The decree also provided, however that the injunction would be dissolved when the pipe was incased and lowered or when the defendants paid $2,900.00 to cover the cost of incasing and lowering.

The appellants' principal argument is that the injunction was improper because there was no evidence

that paving and using the streets would injure the pipe, and therefore the court was actually giving the plaintiff a fee simple interest in the land through which the easement ran. Not only was there sufficient evidence to substantiate the trial court's finding, but the record as a whole convinces us that injury to the pipe would be a probable result of paving and using the streets while the pipe is unprotected and at its present level.

Mr. Baque, an engineer for Buckeye, testified that the pipe should be incased in a larger steel pipe and lowered at the four cross streets in order to protect it from the weight, impact and vibration of traffic passing over it. He testified that the American Petroleum Institute recommended this type of incasing where oil pipes go under highways and railroads. On redirect examination Mr. Bacque pointed out that the pipe was of "thread and collar construction" and that, unless protected in some manner, weight and vibration of traffic over it would cause leakage around the collars.

One of plaintiff's witnesses was Merle Nicewander, the town engineer of Highland and a graduate of the University of Illinois in Civil Engineering. During plaintiff's examination of Mr. Nicewander in rebuttal the court questioned the witness:

> "The Court: I don't know whether my questions are clear. What I am trying to say is, without lowering the pipe line, knowing now its depth, can the streets be put in there as indicated, as they should be?
>
> "The Witness: I think that they will come very close to clearing the pipe line. As was mentioned before, the pipe would go into the curb two inches.

> I didn't find that when I was out there, when we laid out the street, but as far as our improvements are concerned, we can go over the line. I wouldn't guarantee that the line isn't going to get some damage; I wouldn't say that there won't be damage with traffic going over it." Original record, p. 540, printed transcript of record, p. 260.

There was also evidence that the cross streets would increase the pipe's rate of corrosion if it was left unprotected near the surface. Mr. Carl Swartz, a consulting metallurgist, was qualified by plaintiff as an expert witness on this subject. He testified that pipes such as this are subject to "electro-chemical" corrosion. This type of corrosion occurs when different sections of the same pipe are subject to different environmental conditions, especially with regard to water and oxygen. A road would tend to cause corrosion in a pipe which crossed close beneath it because it would alter the amounts of water and oxygen, among other things, in the ground surrounding the section of pipe over which it passed. The appellant's brief gives the impression that Swartz testified that a slag base would cause corrosion, but that a crushed limestone base would not. That impression is not entirely correct. During plaintiff's cross-examination Mr. Swartz said that the likelihood of corrosion would be increased in the presence of both steelmill slag and crushed limestone. The important factor apparently is not so much the chemical composition of material, but its density as affects the amount of water and oxygen passed through to the pipe. Later in cross-examination Mr. Swartz said that the material that would be least apt to cause corrosion would

be anything that was finely packed so as to admit water slowly, such as a very tight, finely divided, well tamped in neutral clay.

Mr. Swartz also testified that there was another method to impede corrosion other than surrounding the pipe with a fill that would tend to keep water from it. The pipe could be covered by a "coarse aggregate," which *if properly drained* would let water run away from the pipe as fast as it seeped through from the surface. Mr. Swartz said that the "coarse aggregate" could be limestone, sandstone or gravel. The most important element in this method of protecting the pipe is, of course, drainage, and it has not been shown that the appellants planned to put drains of any kind around this pipe. Mr. Swartz had visited the site in person and had seen the stone that had been spread over the pipe where the streets cross it. It is clear from his testimony that he thought that pavement over such stone would increase the possibility of corrosion to a pipe immediately beneath it.

The owner of the fee may use the property through which the easement runs in any manner he desires, but he may not interfere with the plaintiff"s enjoyment of its existing rights in the pipe line. *Panhandle Eastern Pipe Line Co.* v. *State Highway Commission*, 294 U.S. 613. An easement is an interest in real property. It is expressed not in terms of possession or occupancy but in terms of use. Therefore, the property of the owner of an easement is taken from him not necessarily when the adverse party occupies the land, but only when he prevents or interferes with the owner's use of the ease-

ment. When that occurs there has been a taking of property from the owner of the easement just as much as if an adverse party had taken real estate which another owned in fee.

In the *Panhandle* case, *supra*, the Kansas Highway Commission tried, under authority of a Kansas statute, to force the pipe line company to remove or lower its pipe at its own expense. The Supreme Court held that this was a taking of property without due process of law. Insofar as the Court's opinion discloses, the pipe line company had only an easement authorizing it to run its pipe through the property in question.

It is well established that a party's acts will be enjoined when it is proved to the Court's satisfaction that the unjustified taking of property will be the imminent result of such acts. *Thomas* v. *Lauer*, 227 Ind. 432, 86 N.E. 2d 71. The injunction is, of course, not granting plaintiff a fee in the surface of the land through which the pipe passes, as the appellants claim. It is simply giving effect to the irrefutable principle that an owner cannot use his land in such a manner, even in the public interest, that it destroys the property of another.

The appellants argue that this controversy is between private interests, Buckeye Pipe Line Company, and the general public, the residents of Highland Terrace, and that the public interest should prevail. The *Panhandle* case, *supra*, answers this contention. In that case the Supreme Court found a taking of private property for public use without compensation unconstitutional, even though the state legislature had specifically provided for such a taking.

The defendant should have no trouble in complying with the part of the decree requiring them to keep traffic from passing over the pipe until the pipe is properly protected. The contractor did just that, by the use of barricades, while the streets were being paved. There is no reason why any one of the defendants could not see that this is continued.

Appellants finally contend that the plaintiff did not enter court with "clean hands." They allude to the various measures taken by Buckeye to inform all those involved of the presence of the pipe and the fact that the defendants would be liable for any damage done. We have examined the entire record very carefully, and find that the plaintiff's warnings were justified by the situation. If the defendants, knowing of the presence of the pipe, had proceeded with their construction and damaged it, they would have been liable not only to Buckeye but to anyone else who was damaged by escaping oil or by a resulting fire. Plaintiff was not only exercising its own right, but was being fair to defendants by warning everyone involved of the probable damage to the pipe line and of plaintiff's rights as the owner of the easement.

The judgment of the District Court is Affirmed.

A true Copy:

Teste: Kenneth J. Carrick,
Clerk of the United States Court of
Appeals for the Seventh Circuit.

(*Appendix*)

THE UNITED STATES DISTRICT COURT
Northern District of Indiana
Hammond Division

The Buckeye Pipe Line Company

vs.

Edward M. Keating, et al.

No. 1509 Civil

FINDINGS OF FACT, CONCLUSIONS OF LAW AND DECREE.

Findings of Fact.

1. Plaintiff is a corporation incorporated under the laws of Ohio, and is qualified to do business within the State of Indiana; defendant, Edward M. Keating, is a citizen of Illinois; defendant, the Town of Highland, is a town located in Lake County, Indiana; defendant, Mercantile National Bank of Hammond, Indiana, as Trustee, is a bank organized and existing under the laws of the United States and has its place of business in Hammond, Indiana; and all other defendants are citizens of Indiana. The matter in controversy exceeds, exclusive of interest and costs, the sum of $3,000.

2. On July 2, 1888, the owners of Section 21, Township 36 north, Range 9 west in Lake County, Indiana, granted to the National Transit Company the right to lay a pipe line across such real estate, which grant was recorded in the office of the Recorder of Lake County, Indiana, on July 17, 1888. The parties agreed in the grant "that this right of way does not convey any fee interest in the land

above described, together with the right to operate, maintain, repair, and remove the same at any time. The pipe shall be laid along the route as indicated by the present survey, and be buried to such a depth as not to interfere with the cultivation of the land, or the existing tile drainage. The National Transit Company, its successors and assigns, agree to pay all damage to growing crops occasioned by laying, operating and removing said pipe line. • • • "

3. Thereafter, about 1888, the National Transit Company laid a pipe line eight inches in diameter across such real estate, pursuant to the grant. A new pipe line was installed in 1923 by the plaintiff's predecessor and this line still exists.

4. On March 31, 1891, The National Transit Company transferred the rights which it had acquired from the grant of July 2, 1888, together with the pipe line, to the Indiana Pipe Line Company by assignment recorded April 9, 1891.

5. By an agreement dated November 10, 1942, approved by the Secretary of the State of Indiana on December 31, 1942, and recorded on January 8, 1943, the Indiana Pipe Line Company merged with the plaintiff. The plaintiff is the surviving corporation and owns the right-of-way and pipe line. The Indiana Pipe Line Company was a subsidiary of the Buckeye Pipe Line Company before the merger.

6. The pipe line has been in continuous service since 1888 and has been and is now used for the transportation of crude petroleum in interstate commerce. The particular line of the plaintiff's running through the above mentioned

realty begins at Griffith, Indiana, and ends at East Chicago, Indiana.

7. The above described real estate is located in the Town of Highland, Lake County, Indiana. The Town of Highland was incorporated in 1910. In 1940 the population was 2,800 and it is now about 9,100. The real estate described above was used for farm land from 1940 until 1952, and there was only one occasion of interference with the cultivation of the land from the pipe line during the time the land was farmed, which was a leak in the pipe and the plaintiff paid damages for this interference.

8. On December 5, 1951, defendant Edward M. Keating became the owner of a portion of the aforesaid Section 21, (being about sixty acres) through which the pipe line is laid, by a quit claim deed.

9. On January 18, 1952, defendant Keating's attorney mailed a letter to an agent of the plaintiff acknowledging the fact that the plaintiff's predecessor was granted an easement and inquiring from the plaintiff the location of the easement on defendant Keating's land. A letter was sent to defendant Keating's attorney on January 28, 1952, from an agent of the plaintiff, in answer to the letter of January 18th, stating that one of the plaintiff's pipe lines in Highland runs through the property acquired by Keating and requesting a map of the Keating property so that the plaintiff's engineers could indicate the exact location of the pipe line. On March 10, 1952, Keating's attorney sent a plat of survey of the Keating property to an agent of plaintiff, which survey showed the location of the plaintiff's easement as determined by Keating's surveyor. The letter recommended that the measurements of Keating's surveyor be checked by the plaintiff's engineers

and suggested that the plaintiff stake out the easement on the physical property. In answer to this letter the plaintiff responded on March 21, 1952, that its engineers indicated the location of its lines on the survey of plat furnished by Keating and that it had the location of its lines staked and noted on the premises.

10. The plat of survey was then given to the engineer for the Town of Highland and considered in preparing plats for developing the Keating subdivision, known as Highland Terrace Second, Third, Fourth and Sixth Additions to the Town of Highland, Lake County, Indiana.

11. On July 15, 1952, the Plan Commission of the Town of Highland accepted the plat for Highland Terrace Second Addition submitted to it by Keating. The Town Board of Highland accepted the same plat on July 16, 1952, and it was recorded on July 30, 1952. Highland Terrace Second Addition is the southern most portion of the Keating subdivision. It is bounded by Kennedy Avenue on the west and Fifth Street on the east. It is about 306 feet in width, north and south, and, similar to the other additions in the Keating subdivision, is about 328 feet long, east and west. Norman Street on the plat runs east and west through the middle of this addition, and Fourth Street runs north and south on the plat through the middle of the addition.

12. On July 15, 1952, Keating conveyed the title to the lots in Highland Terrace Second Addition in trust to the Mercantile National Bank of Hammond, a defendant, herein. Under the trust agreement, the Bank was to sell the lots, except for certain specified ones, and to apply the first earnings for payment to the Gatlin Plumbing and

Heating Company and the O'Day Trucking Company. Keating was the other beneficiary under the trust. Under the terms of the trust the Gatlin Plumbing and Heating Company was to install water and sewer mains and stubbing and the O'Day Trucking Company was to construct and install gutters, curbing and paving on Norman Street from the center line of Kennedy Avenue to the center line of Fifth Street.

13. On December 16, 1952, the Plan Commission and the Town Board of Highland accepted the plat for Highland Terrace Third Addition, and the plat was recorded on December 29, 1953. This addition is just north of the Second Addition to Highland Terrace and is bounded on the east and west by the same streets. It is about 330 feet in width, north and south. Fourth Street runs north and south through the middle of this addition, on the plat, and Ross Street runs through its center east and west as indicated on the plat.

14. On March 18, 1953, Keating conveyed the title to the lots in the Third Addition in trust to the Mercantile National Bank of Hammond. This trust agreement is generally similar to the one created for the Second Addition.

15. On May 26, 1953, the attorney for Buckeye sent a letter to Keating advising him in regard to the pipe line that " * * * In the interest of safety, at least at street crossings, it must be lowered and cased for protection to the line and the public. It is our position that the rights of Buckeye Pipe Line Company are superior to yours, and the expense involved must be borne by you. The Company has estimated the expense at $1,700." This figure related only to the expense involved with reference to the

Second and Third Additions. The letter also indicated that an area twenty-five feet wide running north and south along Fourth Street, provided it was clear of all improvements, would be satisfactory for the pipe line.

16. On June 26, 1953, the attorneys for the Buckeye Pipe Line Company mailed a letter to the President of the Board of Trustees of the Town of Highland informing him that Buckeye was the owner of an easement for a pipe line running through the property being developed by Keating, that Buckeye and Keating had been unable to arrive at some method of bearing the costs of lowering the pipe line, that Keating had informed them that the responsibility rested with the Town of Highland, that Keating did not contemplate improving the streets where they cross or interfere with the pipe line, and that eventually the town and property owners would bring great pressure to bear against Buckeye. The letter stated that Buckeye intended to protect its rights in the real estate and would do it by appropriate procedure.

17. On July 2, 1953, the attorney for Buckeye mailed a notice to Keating, the Town, the Trustee, Calumet Title Company, Lake County Title Company, Union Title Company, O'Day, Nicewander (the Town engineer) and certain individuals who had purchased lots in the Second and Third Additions, that Buckeye owned a grant through and across the Second and Third Additions and that the development thereof and the construction of certain improvements across, under or over the pipe line damages and encroaches upon said grant and denies Buckeye the right of ingress and egress given in said grant to lay, maintain, operate and repair its pipe line and that cer-

tain construction is and will be harmful to the pipe line. The letter further stated:

> "You are therefore notified thereof and that you have and are proceeding at your own risks and in violation of the rights of the Buckeye Pipe Line Company, and you will be held responsible for damages or injury to personnel or property of said company and for damages to the person or property of any firm, person or corporation that may occur."

18. On July 13, 1953, Keating's attorney addressed a letter to Buckeye's attorney stating that Keating would be willing to pay for the lowering of the pipe line if any legal responsibility for the costs could be demonstrated but that none had been made. The letter recommends that the matter should be disposed of between Keating and Buckeye and that Keating would stand behind the "Town Board, the home owners, or any other innocent party."

19. On July 15, 1953, the Plan Commission of the Town of Highland accepted the Fourth Addition to Highland Terrace, and, on July 21, 1953, it was accepted by the Town Board. It was recorded on July 29, 1953. It adjoins the Third Addition on the north and is approximately 330 feet wide, north and south. The same streets bound it on the east and west as the Second and Third Additions. Strong Street runs east and west through the middle of the addition on the plat, and Fourth Street is shown on the plat as running north and south through its center.

20. On October 9, 1953, Keating conveyed the title to the lots in the Fourth Addition in trust to the Mercantile National Bank of Hammond under a generally simi-

lar trust as the ones previously established for the Second and Third Additions.

21. On April 14, 1954, the Plan Commission accepted the Sixth Addition to Highland Terrace and this addition was accepted by the Town Board on April 20, 1954. It adjoins the Fourth Addition on the north and is about 165 feet wide, north and south. Its east and west boundaries are the same streets as the other additions. It is bounded on the north by the center line of an east and west street appearing on the plat as Grand Boulevard. Fourth Street is shown to run through the middle of the Addition in a north, south direction.

22. On May 27, 1954, Keating conveyed the title to the lots in the Sixth Addition in trust to the Mercantile National Bank of Hammond. O'Day Trucking Company, under the trust agreement, is the only beneficiary who is obligated to make improvements in connection with this addition. Otherwise the trust agreement is generally similar to the other three.

23. As indicated on all the plats, Fourth Streets runs through the center of the Keating subdivision in a north, south direction, and parallel to the pipe line of the plaintiff. The distance between the lots on the east and west side of Fourth Street is seventy feet, indicating the amount dedicated to the Town of Highland by Keating in relation to Fourth Street, and this area includes a twenty foot strip set out in the plat as the plaintiff's easement. An area forty-five feet in width, east and west, is planned as the paved portion of Fourth Street and this paved portion is not to be built over any of the twenty feet indicated on the plat as the existing easement of

Buckeye Pipe Line. As planned there would be about ten feet from the western most part of the paved portion of Fourth Street to the pipe line itself. Fourth Street would not interfere with plaintiff's maintenance and repair of the pipe line if built as planned.

24. The plat indicates that Norman, Ross and Strong Streets and the southern half of Grand Boulevard, located in the Keating subdivision, and running in an east and west direction, will cross at right angles over the plaintiff's pipe line. At the time Keating purchased the sixty acres which has now been partially developed and divided into the four subdivisions, the land was being used as farm land and there were no streets or other improvements over or near the pipe line. Norman, Ross and Strong Streets have now been paved except for a twenty foot strip, being about ten feet on each side of the plaintiff's pipe line. Sewers have been laid out east and west about seven to eight feet under the pipe line and will not interfere with it. Water lines have also been installed under the pipe line at least three feet under it and will not interfere with it either. Some limestone was poured over the twenty foot strip left unpaved, on Norman, Ross and Strong Streets. Vehicular traffic has been passing over the unpaved portion of Norman, Ross and Strong Streets and Grand Boulevard and traversing the plaintiff's easement. A few heavy construction vehicles such as cranes and bulldozers have crossed over the unpaved portion of these streets.

25. The pipe line is buried underground throughout the Keating subdivision at an average level of a little less than a foot. In constructing the streets to run across the

pipe line it would be necessary to excavate about ten inches. A six or seven inch base of mostly slag and some stone would be necessary, with a pavement one to two inches thick on top of this. The slag, when placed at such a close proximity to the pipe line, probably would increase the corrosion rate of the line. It is necessary, in order for the plaintiff to enjoy its full rights incident to the easement, that the pipe line be encased and that it be lowered where necessary to conform with accepted engineering practices.

26. The total estimated cost of the encasement and necessary lowering of the pipe line at Norman, Ross and Strong Streets and Grand Boulevard will be approximately $2,900

Conclusions of Law.

1. The court has jurisdiction of the parties and the subject matter herein.

2. The plaintiff has an easement for its pipe line with the right to operate, maintain, repair and remove the same at any time. The rights incident to said easement are to a twenty foot strip parallel and adjacent to a street known as Fourth Street in the town of Highland, Lake County, Indiana, and running north and south through Highland Terrace Second, Third, Fourth and Sixth Additions, located in the Town of Highland, Lake County, Indiana.

3. Plaintiff's title to and rights in said easement are superior to all of the defendants herein.

4. Plaintiff is entitled to an injunction restraining each and all of the defendants herein from directly or indirectly paving over the east and west cross streets over plaintiff's twenty foot strip on Fourth Street, and from directly or indirectly constructing any other permanent structure over such twenty foot strip or causing or permitting any vehicular traffic to pass over such twenty foot strip.

DECREE.

This cause having come on for further and final hearing, and the issues therein having been tried before the court without a jury and the evidence of all the parties hereto having been heard, and the court having duly made findings of fact and conclusions of law.

Now it is this 20th day of May, 1955, Ordered, Adjudged and Decreed, as follows:

1. Defendants Edward M. Keating, Mercantile National Bank of Hammond, Indiana, as Trustee, the Town of Highland, Lake County, Indiana, and Travis H. Cramb, James R. Bateman, John W. Farmer, Robert L. Ross, Benjamin Gearhart, as members of the Board of Town Trustees of the Town of Highland, Lake County, Indiana, and Cyrel W. Melton, Herbert E. Stuart, Harold Voreis, George W. Brant, Kenneth L. Dickinson, Benjamin Gearhart, Larry N. Ashton, John W. Farmer, Robert L. Ross, Raymond B. Young, Merle W. Nicewander, as members of the Plan Commission of the Town of Highland, Lake County, Indiana, herein, their agents, servants, attorneys and privies, and each of them, are

hereby permanently enjoined and restrained from directly or indirectly paving over the east and west cross streets over plaintiff's twenty foot strip on Fourth Street, which streets are located in Highland Terrace Second, Third, Fourth and Sixth Additions in the Town of Highland, Lake County, Indiana, and are designated as Norman, Ross and Strong Streets, and Grand Boulevard, and from directly or indirectly constructing any other permanent structures over such twenty foot strip or causing or permitting any vehicular traffic to pass over such twenty foot strips at said intersections. Provided, however, that this injunction order with respect to the causing or permitting any vehicular traffic to pass over such twenty foot strips at said intersections is hereby stayed until and including the 25th day of May, 1955, in order to give the defendants or any one of them time within which to furnish the bond provided in the succeeding paragraph of this decree.

2. It is further Ordered, Adjudged and Decreed that said injunction shall be dissolved upon a satisfactory showing to the court that there has been an encasing of plaintiff's pipe line at Norman, Ross, and Strong Streets and the south half of Grand Boulevard, and any necessary lowering of the pipe line, all in accordance with plaintiff's usual engineering practices, and that the defendants or any of them have paid the actual cost of said encasement and lowering or the sum of $2,900 toward said cost, whichever sum is lower; further, that said injunction shall be stayed upon the filing of a bond in the amount of $2,900 with sufficient surety by the defendants or any of them conditioned upon the payment at the time of the completion of said encasement and

lowering of the pipe line of the actual cost of said encasement and lowering of the pipe line or the sum of $2,900, whichever sum is lower.

3. It is further Ordered, Adjudged and Decreed that the plaintiff's title to and rights under the aforesaid easement be quieted against all defendants herein.

4. It is further Ordered, Adjudged and Decreed that the "Cross Complaint to Abate Nuisance" of the defendant Town of Highland, Lake County, Indiana, and the "Cross Bill in Equity" of defendant Edward M. Keating, are denied with prejudice to the rights of said defendants.

5. Jurisdiction of this cause is retained for the purpose of giving full effect to this judgment and decree, and for the purpose of making such further and other orders and decrees, or taking such further action, if any, as may become necessary or appropriate to carry out and enforce its judgment and decree.

6. Costs against defendant Edward M. Keating.

Enter:

/s/ Luther M. Swygert,
Judge.

Hammond, Indiana,
May 20, 1955.

(*Appendix*)

IN THE

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago 10, Illinois

Tuesday, March 13, 1956

Before:

Hon. F. RYAN DUFFY, *Chief Judge*
Hon. PHILIP J. FINNEGAN, *Circuit Judge*
Hon. H. NATHAN SWAIM, *Circuit Judge*

Buckeye Pipe Line Company,
Plaintiff-Appellee,

vs.

Edward M. Keating, et al.,
Defendants-Appellants,

and

The Town of Highland,
Lake County, Indiana, et al,,
Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Indiana, Hammond Division.

No. 11565

It is ordered by the Court that the petition for a rehearing of this cause be, and the same is hereby, denied.

(Duffy, C. J., voted to grant petition for rehearing.)

IN THE

JUL 5 19

JOHN T. FEY, Cle

Supreme Court of the United States

OCTOBER TERM, A. D. 1956

No. 154

EDWARD M. KEATING and MERCANTILE NATIONAL BANK OF HAMMOND, as Trustee,

Petitioners,
(Defendants-Appellants),

vs.

THE BUCKEYE PIPE LINE COMPANY,

Respondent,
(Plaintiff-Appellee),

and

THE TOWN OF HIGHLAND, LAKE COUNTY, INDIANA, and TRAVIS H. CRAMB, JAMES B. BATEMAN, JOHN W. FARMER, ROBERT L. ROSS, BENJAMIN GRABHART, as Members of the Board of Town Trustees of the Town of Highland, Lake County, Indiana, and CYRIL W. MELTON, HERBERT R. STUART, HAROLD VORHIS, GEORGE W. KRANT, KENNETH L. DICKINSON, BENJAMIN GRABHART, LAREY W. ASHTON, JOHN W. FARMER, ROBERT L. ROSS, RAYMOND B. YOUNG, MERLE W. NIEWANDER, as Members of the Plan Commission of the Town of Highland, Lake County, Indiana,

Respondents,
(Defendants-Appellees).

ON PETITION FOR WRIT OF CERTIORARI to the United States Court of Appeals for the Seventh Circuit

BRIEF FOR RESPONDENT BUCKEYE IN OPPOSITION

JOSEPH E. TINKHAM
503 Yale Building
Hammond, Indiana

DAVID GREGG, JR.
30 Broad Street
New York 4, New York
Of Counsel

CHARLES M. WELLS,
1313 Merchants Bank Building
Indianapolis 4, Indiana
Counsel for Respondent
Buckeye

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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1956

No. 154

EDWARD M. KEATING and MERCANTILE NATIONAL BANK OF HAMMOND, as Trustee,

Petitioners,
(Defendants-Appellants),

vs.

THE BUCKEYE PIPE LINE COMPANY,

Respondent,
(Plaintiff-Appellee),

and

THE TOWN OF HIGHLAND, LAKE COUNTY, INDIANA, and TRAVIS H. CRAMB, JAMES R. BATEMAN, JOHN W. FARMER, ROBERT L. ROSS, BENJAMIN GEARHART, as Members of the Board of Town Trustees of the Town of Highland, Lake County, Indiana, and CYREL W. MELTON, HERBERT E. STUART, HAROLD VOREIS, GEORGE W. BRANT, KENNETH L. DICKINSON, BENJAMIN GEARHART, LARRY W. ASHTON, JOHN W. FARMER, ROBERT L. ROSS, RAYMOND B. YOUNG, MERLE W. NICEWANDER, as Members of the Plan Commission of the Town of Highland, Lake County, Indiana,

Respondents,
(Defendants-Appellees).

ON PETITION FOR WRIT OF CERTIORARI
to the United States Court of Appeals
for the Seventh Circuit

BRIEF FOR RESPONDENT BUCKEYE IN OPPOSITION

QUESTIONS PRESENTED

It appears from the petition for certiorari (hereinafter designated "P") as a whole that petitioners seek to present in this court three questions:

(a) Whether a change in 1952 in land use from agricultural to residential justified the interference with and burden upon Buckeye's 1888 pipe line easement inherent in the proposed development of the Keating subdivision, without compensation to Buckeye;

(b) Whether trial by the court, not a jury, and quieting title to such easement were proper; and

(c) Whether the injunction against petitioners was proper.

No question concerning the District Court's denial of petitioners' requests for trial by jury was raised in the Court of Appeals, and no such question arises in the record. Hence there can be no such question here.

Petitioners' purported statement of the questions presented in this court (P. 3-7), which consists largely of unsound argumentative matter, contains three serious inaccuracies. (i) One is the assertion that under the opinion of the Court of Appeals an owner of a pipe line easement "across farmland may convert the same, through a combination injunction-quiet title suit in a federal court into fee ownership of a valuable twenty foot strip" (P. 3) and "obtain exclusive occupancy of the surface of the land" (P. 6). Keating's own plats established the twenty-foot width. (Finding 23, R. 29.) Neither such opinion nor the District Court's decree converted the easement into fee ownership of the land itself; nor has Buckeye ever claimed such fee ownership. The reference in the decree to "plaintiff's twenty-foot strip" did not operate to give Buckeye the fee title to such strip. That the court was referring only to Buckeye's easement in such strip is clear from the provision in

the decree that "the plaintiff's title to and rights under the aforesaid easement be quieted against all defendants herein." (ii) Another is the implication (P. 6) that Buckeye was not in possession of its easement. Buckeye is in possession of its easement and, with its predecessors, has been continuously since 1888, when the pipe was laid. (iii) Also inaccurate is the statement (P. 7) that the Trustee denied the allegation in the amendment to the complaint that the Trustee was claiming an interest in Buckeye's easement adverse to Buckeye. Such allegation, the only one in the amendment (R. 22), was admitted by the Trustee in rhetorical paragraph 7 of its answer (R. 23).

STATEMENT OF THE CASE

This litigation was commenced after negotiations concerning payment of the expense of lowering Buckeye's pipe line in the Keating subdivision and encasing it at street intersections (Findings 15, 16, 18, R. 27-28) failed to culminate in an agreement (R. 44). Such lowering and encasing were necessitated by the cross streets in such subdivision. (Finding 25, R. 30.) Buckeye sued to enjoin interference with, and to quiet the title to, its easement. Federal jurisdiction was based on diversity of citizenship, violation of the Fourteenth Amendment to the Constitution of the United States, and interference with Buckeye's performance of its duties and functions as an interstate common carrier. (R. 5, 7; Finding 6, R. 25.)

In his "cross-bill," Keating alleged that Buckeye's pipe was not buried as originally agreed, that the continued maintenance of the exposed pipe "constitutes an undue burden on the fee owner," and that "due to changed conditions the failure and refusal of plaintiff to bury the pipe

results in the maintenance of a public nuisance." (R. 14.) At the trial, counsel for petitioners stated to the court that "this Court should, based upon the evidence, enter a decree requiring the plaintiff to bury its pipe to protect the people of the town of Highland." (R. 46.) However, the cross-bill was denied. (R. 33.)

In laying out his subdivision, Keating employed a registered engineer, Merle Nicewander, who was also the engineer of the Town of Highland and a member of the Town's plan commission. (R. 60.) He suggested to Keating that arrangements be made between Keating and Buckeye for any alterations necessary to clear the improvements (R. 73), "anything that might have to be done to the pipe line to conform to our street grades" (R. 251). He left it in Keating's hands to clear up the matter. (R. 249-257.) Such arrangements were not made. (R. 257.) Keating's attorney stated in a letter to Buckeye's attorney: "The crux of the matter, as we see it, is who is to pay for lowering of the pipe. Mr. Keating is willing to pay for the lowering of the pipe if any legal responsibility for the cost could be demonstrated. No such demonstration has been made." This letter is summarized in Finding 18 of the District Court. (R. 28.)

Lowering of the line and encasing it at the east-west cross streets in the Keating subdivision are necessary to protect the pipe from traffic impacts and vibration. (R. 125-126.) As the pipe is of thread and collar construction, vehicular traffic, in the absence of steel encasement pipe, would subject the collars to considerable strain and cause leakage. (R. 136.) The lowering and encasing would also facilitate maintenance. (R. 137.) The curb would be two inches below the top of the pipe, and so would the foundation of the

pavement of at least one of the cross streets. (R. 260, 261.) There is no way to avoid lowering to clear the roads. (R. 138.) Formerly encasement of pipe lines under streets was done with concrete. (R. 137.) For the past several years (R. 138), encasement with steel pipe has been the method approved or required by the State Highway Commission, railroads, some counties, and the American Petroleum Institute (R. 124-125.) Where lowering and encasing or other changes in Buckeye's lines are necessary at street crossings, Buckeye does the work at its expense if the particular line was laid pursuant to an easement or license granted by a city, county or other governmental body prior to the laying of the line, but not if the easement was privately granted and the line laid before the change became necessary. (R. 267, 272-273.)

The Trustee has withheld $500 to pay for the paving of two of the cross streets. (R. 165.) Payment for paving the other two has not been completed (R. 165-166), but the Trustee will withhold $500 for paving them over the easement (R. 187). The conduct of Keating's contractors was pursuant to authority given them by the trust agreements. (R. 244.)

The cross streets have been paved for the most part with slag (some stone was used) six or seven inches thick (R. 65), and a surface topping one to two inches thick (R. 70), except over Buckeye's easement (R. 71). Paving over such easement in the same manner is contemplated. (R. 65-66, 72-73.) Corrosion of the pipe from the slag is probable. (R. 100.)

During and after construction of the improvements in the Keating subdivision, his contractor placed barricades

along the streets "to protect the Buckeye pipe line" (R. 196) by "stopping vehicular traffic from crossing" (R. 198). They were removed at various times by unknown persons and replaced by the contractor "until it came to the point that it became quite expensive," so he advised the Town Board that he could no longer accept that responsibility. (R. 199.)

At the time of trial, trucks and automobiles were moving over the line. (R. 74.) Some of the trucks were loaded. (R. 75.) During construction, heavy equipment crossed the line. (R. 207.) Where one of the cross streets intersects the line, the ground was saturated with oil on one occasion during construction. (R. 193.)

At the trial, petitioners' counsel, speaking of the twenty-foot strip, stated to the court: "It was laid out and kept apart from the subdivision so that no street would cover and interfere with the easement." (R. 233.)

The District Court enjoined interference with, and quieted Buckeye's title to, the easement. The Court of Appeals affirmed.

ARGUMENT

It is clear that the questions which petitioners attempt to present in this court are not such as to warrant review on certiorari. Although a conflict between a change in land use and a prior pipe line easement may occur often throughout the United States, the position of petitioners that the easement owner must at his expense adapt the easement to such change is rarely asserted, for it is contrary to the decision of this court in *Panhandle Eastern Pipe Line Co. v. State Highway Commission* (1935), 294 U. S. 613. The other questions sought to be presented are neither new nor of public importance, and applicable law is well settled.

The "public" referred to by petitioners (P. 10) consisted for the most part of purchasers of lots in the Keating subdivision. They had not only constructive notice of plaintiff's easement by reason of its being recorded, but also actual notice thereof, by reason of the barricades.

Practically all the evidence on which the District Court's findings of fact were based was undisputed.[1] The findings were certainly not "clearly erroneous";[2] indeed, they were clearly correct. The conclusions of law and decree were entirely proper and the decision of the Court of Appeals was correct.

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1 The evidence consisted not only of the testimony (R. 47-277) but also of 37 exhibits, which were before the Court of Appeals but are not before this court.

2 Rule 52(a), Federal Rules of Civil Procedure. Rule numbers hereinafter cited refer to such rules.

I

No State Question Has Been Decided in Conflict with Indiana Real Property Law

Petitioners' principal argument here appears to be that under Indiana real property law, a "new and different" use for the land occupied by Buckeye's pipe (P. 11) or "a different and more suitable use than farming" (P. 14) permits Keating to "use the surface of the land which he purchased" (P. 13) for the paving of streets in his subdivision regardless of the conflict of such paving with Buckeye's prior easement, and that hence Buckeye must at its expense adapt its easement to the new use. Such argument is not supported by Indiana real property law or any other law of which Buckeye's counsel is aware.

As Buckeye has shown, petitioners clearly recognized in the District Court that a conflict exists between Buckeye's easement and the cross streets in the Keating subdivision. Not until they got into the Court of Appeals did petitioners contend that there was no such conflict. (Their position in the District Court that the line was not buried deep enough to comply with the 1888 grant was not sustained by the evidence, and hence was rejected in the District Court's findings.) The District Court found, in effect that such conflict exists:

> "In constructing the streets to run across the pipe line it would be necessary to excavate about ten inches. * * * It is necessary in order for the plaintiff to enjoy its full rights incident to the easement that the pipe line be encased and that it be lowered where necessary to conform with accepted engineering practices." (Finding 25, R. 30.)

The 1888 grant of easement for laying, operating, maintaining and removing the pipe line provided that the pipe should be laid along the route indicated by the survey made at that time; that it should be buried at such a depth as not to interfere with the cultivation of the land or the tile drainage and that the grantee should pay all damages to growing crops occasioned by laying, operating and removing the line. The pipe is so buried and has been since 1888.

There is nothing ambiguous in the grant, and therefore nothing requiring construction.[3] If there were, conditions existing when the grant was executed, rather than subsequent conditions, should be considered in construing it. Annotation (1942), 142 A. L. R. 467, 469.

The argument based on a change, after a period of years, in the economic use of land is not new, but the Indiana Supreme Court has consistently denied an attempt by one party, because of a change in conditions or otherwise, to change the terms of a grant of easement.

Thus, in *Hodgson v. Jeffries* (1876), 52 Ind. 334, about 15 years after a perpetual easement for a drainage ditch had been granted, during which time it was used, the grantor's successor obstructed the ditch. He contended he had a right to do so because the character of the land had changed from wooded to agricultural and because the grantor could not foresee the consequences of such change. Such contention was rejected. The decision is in harmony with the general rule that "the rights of the owner of the easement are paramount, to the extent of the grant, to those of the owner of the soil." 17 Am. Jur., *Easement*, § 96, pp. 993-994. Whether the change is from wooded to agricultural or, as

3 The language concerning nonconveyance of a fee interest in the land appears out of context because it was inserted in a blank in a printed form.

here, from agricultural to residential, is, of course, immaterial.

And in *Wysor v. Lake Erie & Western R. Co.* (1895), 143 Ind. 6, 42 N. E. 353, the grantee of a right of way attempted to change the terms of the grant by relocating a transfer track which had been used by the grantor for ten years after the grant. The court held this could not be done.

Forsyth v. American Maize Products Co. (1915), 59 Ind. App. 634, 108 N. E. 622 (P. 12), does not conflict with the decision herein. It was a companion case to *Shedd v. American Maize Products Co.* (1915), 60 Ind. App. 146, 108 N. E. 610. In *Shedd*, interference with a pipe line easement was enjoined. Forsyth sought to intervene in that litigation but waited two years, and intervention was therefore denied in *Forsyth*. Forsyth had the right, granted prior to the grant of the pipe line easement, to dredge in a harbor in Lake Michigan where the pipe line emptied. At the time of the litigation, however, there was no evidence that he intended to exercise that right, and hence there was no conflict. Here, on the other hand, the proposed removal of ten inches of earth from above Buckeye's pipe line and the proposed pavement in very close proximity thereto would interfere, under the undisputed evidence, with Buckeye's easement. Hence the District Court found that lowering and encasement are necessary.

Nor are *Besser v. Buckeye Pine Line Co.* (1937), 57 Ohio App. 341, 13 N. E. (2d) 927 (P. 4, 5, 11), and *Babler v. Shell Pipe Line Corp.* (1940), 34 F. Supp. 10 (P. 11-12), applicable. In *Besser*, the landowner granted a pipe line easement "over and through" tillable farm land. The line was laid in the ground at such depth that plaintiff in plowing

struck the line, was thrown from his plow and was injured. Buckeye, the defendant, contended that "over and through" meant on the surface or at any depth. However, the court construed the grant as reserving to the grantor the right to cultivate the land above the line, and ordered a new trial. (Ultimately there was a final judgment for defendant.) Such issue is not involved here, for by the very terms of the 1888 grant, the grantors and their successors may cultivate the land. They may not, however, burden the easement by a conflicting subdivision.

In *Babler*, the grant of easement required the grantee to pay any damages "which may arise to crops, timber, fences *or buildings* of said Grantor from the exercise of the rights herein granted." (Emphasis supplied.) The court construed the grant as not precluding construction of a building over the line or other use of the surface of the ground so long as such use would not disturb, injure or destroy the pipe lines below the surface. Here, Keating's proposed paving of the cross streets over the line would disturb and injure the pipe line and impair maintenance. Further, the 1888 grant contains no reference to buildings or other surface structures but merely obligates the grantee to pay crop damages. This distinction was one of the grounds of decision in *Arkansas Louisiana Gas Co. v. Cutrer* (La. App., 1947), 30 So. 2d 864, where the erection of a small wooden building was enjoined, and its removal was ordered. In *Babler*, the court commented on the change in character of the land involved from agricultural to residential. As Buckeye has shown, however, the Indiana and general rule on this point is that such a change cannot affect the rights of the parties as set forth in the grant.

Petitioners' attempt to distinguish *Panhandle Eastern Pipe Line Co. v. State Highway Commission* (1935), 294 U. S. 613, is futile. There Panhandle operated pipe lines for transportation of gas in interstate and intrastate commerce on easements privately granted to Panhandle. Panhandle also owned telephone lines on such easements. After the lines were in operation, the Highway Commission of Kansas adopted plans for a new highway across Panhandle's rights of way. Under such plans, it was necessary that the telephone lines be removed and that the pipe lines be lowered or encased or both, as is shown by the printed record (pp. 3-4) in the *Panhandle* case. Contrary to petitioners' suggestion (P. 14), removal of Panhandle's pipe lines was not involved. In any event, this court properly made no distinction between removals and other changes. The issue was whether Panhandle could be required to make the necessary changes, at its expense. It was willing to make them if promised repayment. Acting under a Kansas statute which purported to authorize the Commission to require Panhandle to make the changes at its expense, the Commission ordered Panhandle to do so, and it refused. This court upheld the refusal, inasmuch as the challenged statute as construed below was unconstitutional. The distinction pointed out by this court between the Panhandle situation and that in *New Orleans Gaslight Co. v. Drainage Commission*, 197 U. S. 453, and similar cases involving pipes in public streets, was reflected in the rule which Buckeye has long observed, namely, that when Buckeye's pipe, laid under an easement or license from a governmental body, needs to be lowered and encased or otherwise altered to accommodate street or highway changes, Buckeye does the work at its expense, but where Buckeye's line was laid pursuant to a private grant of easement in a location not

involving any public improvement when laid, any change in the line due to a subsequent public improvement is not at Buckeye's expense. (R. 267, 272-273.) Keating seeks to burden Buckeye's easement in the same manner as the Highway Commission of Kansas sought to burden Panhandle's. *Panhandle* obviously controls the decision of the principal issue here of whether the easement owner may stop interference with its easement consisting of the proposed construction of streets which necessitate the lowering and encasing of the pipe.

In *Thomas v. Lauer* (1949), 227 Ind. 432, 86 N. E. 2d 71, the Indiana State Highway Commission, without condemnation, proposed to take certain property leased to Thomas. Said the court (p. 437):

> "In the case before us the State Highway Commission * * * has admitted that it has threatened and intends to take appellant's leasehold estate in the real estate involved, not by purchase or voluntary grant or condemnation within its statutory authority, but by arbitrary seizure beyond its statutory authority. Such action should be stopped."

Thomas was held entitled to an injunction. Although that case involved a leasehold interest instead of an easement, the basis of the decision is plainly applicable here.

Interference with a pipe line easement was enjoined also in *Industrial Gas Co. v. Jones* (1939), 62 Ohio App. 553, 24 N. E. 2d 830, and *Central Kentucky Natural Gas Co. v. Huls* (Ky. App., 1951), 241 S. W. 2d 986, 28 A. L. R. 2d 621.

Had the Town of Highland condemned the encroachment on Buckeye's easement by the proposed streets in the Keat-

ing subdivision, the cost of lowering and encasing the line could have been recovered by Buckeye in the condemnation proceedings.[4] Petitioners are obviously in no more favorable position by attempting to move in without condemnation than they would be if such proceedings had been brought.

Manifestly, the Court of Appeals has not decided a state question in conflict with real property law of Indiana or any other jurisdiction.

II

No Federal Question Has Been Decided in Conflict with Decisions of This Court

Whitehead v. Shattuck (1891), 138 U. S. 146 (P. 15-16), is not applicable. Buckeye is not a party out of possession of its easement. Buckeye and its predecessors have been in possession thereof since 1888.

As no question was raised by petitioners in the Court of Appeals concerning the District Court's denial of their requests for trial by jury (R. 2-3, 38-39), and as no such question arises on the record, it is not open for consideration here. In *Tyrrell v. District of Columbia* (1917), 243 U. S. 1, this court pointed out that (p. 4)

> "the question upon which the certiorari was prayed * * * does not arise on the record and is not open for consideration, and therefore * * * the petition for certiorari was rested upon a wholly unsubstantial and nonexisting ground * * *."

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[4] *Petition of Dreosch* (1951), 233 Minn. 274, 47 N. W. 2d 106; *Commonwealth v. Means & Russell Iron Co.* (1945), 299 Ky. 465, 185 S. W. 2d 960; *Cities Service Gas Co. v. Riverside Drainage Dist.* (1933), 137 Kan. 410, 20 P. 2d 520.

See also, *Walters v. City of St. Louis* (1954), 347 U. S. 231, 233; *Jesionowski v. Boston & Maine R. Co.* (1947), 329 U. S. 452, 458-459.

Moreover, denial of the requests for jury trial was proper, as "a suit to quiet title is a purely equitable proceeding, and a federal court is not required to resort to a jury." *Humble Oil & Refining Co. v. Sun Oil Co.* (5 Cir., 1951), 191 F. 2d 705, 718, cert. den. (1952), 342 U. S. 920. See also, *United States v. Louisiana* (1950), 339 U. S. 699, 706; *Ettelson v. Metropolitan Life Ins. Co.* (1943), 137 F. 2d 62, 65, cert. den. (1943), 320 U. S. 777.

III

The District Court Did Not Depart from Accepted and Usual Course of Judicial Proceedings

In petitioners' statement (P. 17) that the only suggestion in the District Court's findings of actual or potential damage to Buckeye's pipe line was that the proposed use of slag would probably increase the corrosion rate of the line,[5] petitioners ignore the other findings in No. 25 (R. 30) that in constructing the streets to run across the pipe line, it would be necessary to excavate about ten inches, and that lowering and encasing Buckeye's line are necessary in order for Buckeye to enjoy its full easement rights. Whether there was interference was, of course, a question of fact for the trial court. 17 Am. Jur., *Easements*, § 96, p. 995.

Buckeye was clearly entitled to an injunction. It is elementary, as set forth in 28 Am. Jur., *Injunctions*, § 30, p. 223, that

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[5] The discussion of drainage in the opinion of the Court of Appeals is entirely consistent with this finding.

> "where the danger is probable and threatened, the party may invoke the aid of equity to prevent it and need not delay his application for injunction until the injury has actually been inflicted."

And in *Pennsylvania v. West Virginia* (1923), 262 U. S. 553, Pennsylvania and Ohio sued to enjoin West Virginia from enforcing a statute upon the ground that it would cut off or injuriously affect the supply of natural gas produced in West Virginia and transported by pipe lines into the territory of plaintiff states and there sold and used. Said the court (P. 593):

> "One does not have to await the consummation of threatened injury to obtain preventive relief."

Had Buckeye stood by and permitted construction of the conflicting streets, defenses of laches and estoppel would doubtless have been asserted. *New York v. Pine* (1902), 185 U. S. 93.

With respect to the Trustee, it holds the funds with which to pay Keating's contractor for paving the cross streets in the easement, as was brought out by petitioners' own witnesses. (R. 165, 187.) And Keating testified that the conduct of his contractors was pursuant to authority conferred by the trust agreement (R. 243-244), which was among Keating, the Trustee and the contractors. Thus, the Trustee was associated and legally identified with Keating, and was properly included in the scope of the injunction. As was pointed out in *Chase National Bank v. Norwalk* (1934), 291 U. S. 431, 436-437:

> "It is true that persons not technically agents or employees may be specifically enjoined from

> knowingly aiding a defendant in performing a prohibited act if their relation is that of associate or confederate. Since such persons are legally identified with the defendant * * *, the provision merely makes explicit as to them that which the law already implies. See *In re Lennon*, 166 U. S. 548."

See also, Rule 65(d). The prayer of the complaint was not controlling. Rule 54(c); *Reconstruction Finance Corp. v. Goldberg* (7 Cir., 1944), 143 F. 2d 752, 759.

A decree quieting title to, and enjoining obstruction of, Buckeye's easement was entirely proper. Rule 8(a). The two forms of relief were combined in *Hipes v. Doherty* (1911), 176 Ind. 379, 96 N. E. 152; *Chamberlin v. Myers* (1918), 68 Ind. App. 342, 120 N. E. 600; and *Switzer v. Armantrout* (1939), 106 Ind. App. 468, 19 N. E. 2d 858.

The suggestion (P. 7, 19) that the injunction was impossible of performance is contrary to petitioners' admission (P. 7) that: "Upon the rendition of the decree, the Town of Highland blocked the public streets with horizontal telephone poles. They remain blocked in this manner at the present." This, of course, complied with the traffic provision of the injunction. And inaction otherwise of all defendants complied with the other provisions thereof.

CONCLUSION

It is strikingly clear that as there is no basis whatever for certiorari, the petition should be denied.

Respectfully submitted,

CHARLES M. WELLS,
Counsel for Respondent Buckeye

JOSEPH E. TINKHAM
DAVID GREGG, JR.
Of Counsel.